A

SEMENDA SDN BHD & ANOR

v.

CD ANUGERAH SDN BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
SULONG MATJERAIE JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: N-02-8-2007]

C

23 FEBRUARY 2010

CONTRACT: *Letter of undertaking - Breach - High Court judge's decision based on a wrong premise that 2nd appellant knew or ought to have known that balance purchase price not received by 2nd respondent*

D

when 5 February 1998 letter was given - When appellants notified that balance of purchase price not with respondent - 2nd appellant's letter of 6 February 1998 was completely ignored by High Court judge in his evaluation - Incumbent on all solicitors to examine undertakings given closely - Whether 2nd respondent responsible for undertaking

E

CONTRACT: *Construction - Terms of undertaking - Letters of 5 February 1998 and 6 February 1998 - Respondent received and accepted 6 February 1998 letter without any qualification and acted on it - Subsequent letters written by the 2nd respondent after registration of the transfer and charge an afterthought*

F

Pursuant to a Power of Attorney granted by the 1st appellant to Dandarawi Sdn Bhd ('Attorney'), the Attorney entered into a Sale & Purchase Agreement dated 28 May 1997 ('the Agreement') with CD Anugerah Sdn Bhd, the 1st respondent, for the sale of a piece

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of land for RM600,000. 10% of the purchase price was paid upon execution of the Agreement. The 1st appellant was represented by the 2nd appellant whereas the 1st respondent was represented by the 2nd respondent. The balance purchase price was payable in accordance with the terms and conditions of the Agreement.

H

Pursuant to cl. 5.3 of the Agreement, the 2nd appellant shall only forward the original document of title, current quit rent receipts and assessment receipts after the balance purchase price had been received by the 2nd appellant. The 2nd respondent wrote a letter dated 5 February 1998 to the 2nd appellant requesting for the

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Original Issue Title together with the Original Letter of Consent of

Transfer for presentation purposes on their undertaking to release to the 2nd appellant the balance purchase price within three weeks from the date of presentation. The 2nd appellant in their letter dated 6 February 1998 forwarded the documents to the 2nd respondent for the purpose of presentation to the Land Office; upon the respondent's undertaking to release the balance purchase price to the 2nd appellant within three weeks from the date of presentation; and upon the 2nd respondent's clients' undertaking to pay the late interest for late payment. The 2nd respondent received and accepted the documents forwarded without any qualification and caused the land to be registered in favour of CD Anugerah Sdn Bhd on 24 February 1998. The balance purchase price was due and payable on 17 March 1998 but no payment was received. On 18 March 1998 the 2nd appellant wrote to the 2nd respondent asking for the release of the RM540,000. The 2nd respondent resiled from their undertaking by replying that such undertaking was given on behalf of their client and not from their firm. The 2nd appellant filed an action in the High Court. The High Court judge held that the undertaking given by the 2nd respondent was not their personal undertaking but rather an undertaking given by them as an agent of their client. The 2nd appellant's claim was dismissed with costs and it appealed to the Court of Appeal.

Held (allowing the appeal with costs)
Per Sulong Matjeraie JCA:

(1) The decision of the learned High Court judge was based on a wrong premise that the 2nd appellant knew or ought to have known that when 5 February 1998 letter was given, the balance purchase price has not been received by the 2nd respondent. The appellants were only notified by the 2nd respondent in their letter dated 18 March 1998 in respect of the balance purchase price. Clearly there was a misdirection here. Furthermore, by virtue of cls. 5.3 and 6.2 of the Agreement it is only reasonable for the 2nd appellant to expect that when the letter of 5 February 1998 was issued, the balance purchase price was in all probability with the 2nd respondent. (para 26)

(2) The letter dated 6 February 1998 from the 2nd appellant was completely ignored by the High Court judge in his evaluation of the case. It is equally important as it qualifies the 2nd respondent's letter of 5 February 1998. The 2nd appellant sent

A the documents to the 2nd respondent upon the undertaking of the 2nd respondent to release to the 2nd appellant the balance purchase price of the said land within three weeks from the date of presentation of the transfer. As this was completely ignored, the premise upon which the High Court judge came to
B his conclusion and finding cannot be sustained. (para 26)

(3) The 2nd respondent received and accepted the 6 February 1998 letter without any qualification and acted on it. The subsequent letters written by the 2nd respondent after the registration of the
C transfer and charge are an afterthought. Hence, the letters made after the 6 February 1998 letter cannot be taken into account to ascertain the intention of the parties. *James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* (foll). (paras 33-36)

D **(4)** Letters of undertaking are widely used in legal practice particularly in firms handling conveyancing work. It is incumbent upon all solicitors to examine each undertaking given closely. The fact that the undertaking is made on behalf of their client should not and will not absolve them from the
E need to be responsible for their actions in ensuring that all is in order before such letters of undertaking are issued or accepted or even acted upon. Each and every word used must be properly construed. *Nasir Kenzin & Tan v. Elegant Group Sdn Bhd* (refd); *Caldwell v. Sumpters (a firm) and Another* (foll).
F (paras 38-40)

(5) The Original Document of Title and the Original Consent Letter were offered to the 2nd respondent on the terms of 6 February 1998 letter. If the 2nd respondent was unable to
G adhere and comply with the requirements of 6 February 1998 letter, the 2nd respondent should have returned the documents to the 2nd appellant rather than proceed to register the transfer. On the balance of probabilities the 2nd respondent's failure to return the documents to the 2nd appellant means that the 2nd
H respondent accepted the terms imposed by the 2nd appellant in their letter and must be held responsible for the undertaking. *Hawkins v. Gaden* (foll). (paras 44-46 & 54-55)

I

Bahasa Malaysia *Translation Of Headnotes*

Menurut suatu Surat Kuasa Wakil yang diberi oleh perayu pertama kepada Dandarawi Sdn Bhd ('Peguam'), Peguam telah memeterai suatu Perjanjian Jual Beli bertarikh 28 Mei 1997 ('Perjanjian') dengan CD Anugerah Sdn Bhd, responden pertama, bagi jualan sebidang tanah untuk RM600,000. 10% daripada harga belian telah dibayar semasa Perjanjian itu dilaksanakan. Perayu pertama diwakili oleh perayu kedua sementara responden pertama diwakili oleh responden kedua. Baki harga belian boleh dibayar mengikut terma-terma dan syarat-syarat Perjanjian. Menurut kl. 5.3 Perjanjian, perayu kedua hanya akan mengemukakan dokumen hakmilik asal, resit-resit cukai tanah semasa dan resit-resit taksiran selepas baki harga belian telah diterima oleh perayu kedua. Responden kedua menulis sepucuk surat bertarikh 5 Februari 1998 kepada perayu kedua meminta Hakmilik Keluaran Asal bersama dengan Surat Persetujuan Pindah Milik Asal bagi tujuan perserahan atas akujanji mereka untuk melepaskan kepada perayu kedua baki harga belian dalam masa tiga minggi dari tarikh perserahan. Perayu kedua dalam surat mereka bertarikh 6 Februari 1998 menghantar dokumen-dokumen kepada responden kedua bagi tujuan perserahan kepada Tanah Pejabat; atas akujanji responden untuk melepaskan baki harga belian kepada perayu kedua dalam masa tiga minggu dari tarikh perserahan; dan atas akujanji pelanggan-pelanggan responden kedua untuk membayar bunga terlewat bagi pembayaran terlewat. Responden kedua menerima dokumen-dokumen yang dihantar tanpa apa-apa syarat dan menyebabkan tanah tersebut didaftarkan atas nama CD Anugerah Sdn Bhd pada 24 Februari 1998. Baki harga belian perlu dibayar pada 17 Mac 1998 tetapi tidak ada bayaran yang diterima. Pada 18 Mac 1998 perayu kedua menulis kepada responden kedua untuk meminta pelepasan RM540,000. Responden kedua mengundur daripada akujanji mereka dengan menjawab bahawa akujanji sebegitu telah diberi bagi pihak pelanggan mereka dan bukan dari firma mereka. Perayu kedua memfailkan suatu tindakan dalam Mahkamah Tinggi. Hakim Mahkamah Tinggi memutuskan bahawa akujanji yang diberikan oleh responden kedua bukan akujanji persendirian mereka tetapi lebih merupakan suatu akujanji yang diberi oleh mereka sebagai agen pelanggan mereka. Tuntutan perayu kedua ditolak dengan kos dan ia merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Sulong Matjeraie HMR:

(1) Keputusan yang arif Hakim Mahkamah Tinggi berdasarkan suatu premis salah bahawa perayu kedua mengetahui atau sepatutnya mengetahui apabila surat 5 Februari 1998 telah diberi, baki harga belian belum lagi diterima oleh responden kedua. Perayu-perayu hanya diberitahu oleh responden kedua dalam surat mereka bertarikh 18 Mac 1998 mengenai baki harga belian. Jelasnya terdapat salah arahan di sini. Lagipun, mengikut kls. 5.3 dan 6.2 Perjanjian ia hanya munasabah bagi perayu kedua untuk mengharapkan apabila surat bertarikh 5 Februari 1998 dikeluarkan, baki harga belian besar kemungkinan berada dengan responden kedua.

(2) Surat bertarikh 6 Februari 1998 daripada perayu kedua langsung tidak dipedulikan oleh hakim Mahkamah Tinggi semasa beliau menimbangkan kes. Ia adalah sama penting kerana ia menjelaskan surat responden kedua bertarikh 5 Februari 1998. Perayu kedua menghantar dokumen-dokumen kepada responden kedua atas akujanji responden kedua untuk melepaskan kepada perayu kedua baki harga belian tanah tersebut dalam masa tiga minggu dari tarikh perserahan pindah milik. Oleh kerana ini langsung tidak dipedulikan, premis atas mana hakim Mahkamah Tinggi mencapai kesimpulan dan dapatannya tidak dapat dipertahankan.

(3) Responden kedua menerima surat 6 Februari 1998 tanpa apa-apa syarat dan telah bertindak atasnya. Surat-surat selepas itu yang ditulis oleh responden kedua selepas pendaftaran pindah milik dan gadaian adalah sesuatu yang hanya difikirkan kemudian. Oleh itu, surat-surat yang dibuat selepas surat 6 Februari 1998 tidak boleh dipertimbangkan untuk menentukan niat pihak-pihak. *James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* (diikuti).

(4) Surat-surat akujanji banyak digunakan dalam amalan undang-undang terutamanya dalam firma-firma yang menguruskan kerja-kerja pemindahhakkan. Semua peguamcara perlu mengkaji setiap akujanji yang diberikan dengan teliti. Kenyataan bahawa akujanji dibuat bagi pihak pelanggan mereka tidak sepatutnya dan tidak dapat mengampuni mereka dari keperluan untuk bertanggungjawab bagi tindakan mereka dalam menentukan bahawa semuanya

teratur sebelum surat-surat akujanji sebegitu dikeluarkan atau diterima ataupun diambil tindakan atas. Setiap satu perkataan yang digunakan mesti ditafsirkan dengan betul. *Nasir Kenzin & Tan v. Elegant Group Sdn Bhd* (dirujuk); *Caldwell v. Sumpters (a firm) and Another* (diikuti).

(5) Dokumen Hakmilik Asal dan Surat Persetujuan Asal telah ditawarkan kepada responden kedua atas terma-terma surat 6 Februari 1998. Jika responden kedua tidak dapat mengikut dan mematuhi keperluan-keperluan surat 6 Februari 1998, responden kedua sepatutnya mengembalikan dokumen-dokumen itu kepada perayu kedua dan bukan meneruskan dengan pendaftaran pindah milik tersebut. Atas imbangan kebarangkalian kegagalan responden kedua untuk mengembalikan dokumen-dokumen itu kepada perayu kedua bermaksud bahawa responden kedua telah menerima terma-terma yang dikenakan oleh perayu kedua di dalam surat mereka dan mesti bertanggungjawab bagi akujanji tersebut. *Hawkins v. Gaden* (diikuti).

Case(s) referred to:

Caldwell v. Sumpters (a firm) and Another [1972] 1 All ER 567 ***(foll)***

Hawkins v. Gaden [1925] 37 CLR 183 ***(foll)***

James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796 ***(foll)***

Nasir Kenzin & Tan v. Elegant Group Sdn Bhd [2009] 1 CLJ 47 CA ***(refd)***

Syarikat Jengka Sdn Bhd v. Tri Trade Properties (M) Sdn Bhd & Ors [1988] 2 CLJ 852; [1988] 2 CLJ (Rep) 451 HC ***(dist)***

T Damodaran v. Choe Kuan Him [1979] 1 LNS 107 PC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 73A(3)

For the appellants - Manian Raju; M/s Krishna Dallumah, Manian & Indran
For the respondents - CK Yeoh; M/s Ranjit Singh & Yeoh

[Editor's note: For the High Court judgment, please see Semenda Sdn Bhd & Satu Lagi lwn. CD Anugerah Sdn Bhd & Satu Lagi [2007] 8 CLJ 36.]

Reported by Susheila Sreedharan

JUDGMENT

Sulong Matjeraie JCA:

[1] This is the judgment of the court.

Preamble

[2] At all material times in the land transaction relevant to this case, the 1st appellant was represented by the 2nd appellant, Messrs Saprudin & Co. whereas CD Anugerah Sdn. Bhd. was represented by Messrs Abu Talib Shahrom & Zahari. It should also be noted here that a default judgment had been obtained by the appellants against CD Anugerah Sdn. Bhd.

Brief Facts

[3] By virtue of a Power of Attorney granted by the 1st appellant to Dandarawi Sdn Bhd (81234-K), a company incorporated in Malaysia and having its place of Business at No. 63, 1st Floor, Jalan Tuanku Antah, 70100 Seremban, Negeri Sembilan Darul Khusus ('Attorney'), the Attorney entered into a Sale & Purchase Agreement dated 28 May 1997 ('the Agreement') with CD Anugerah Sdn. Bhd. (274292-V) a company incorporated in Malaysia and having its place of Business at 21B, Jalan SS 6/12, Kelana Jaya, 47301 Petaling Jaya, Selangor Darul Ehsan for the sale of a piece of land under H.S.(D). 72032, PT No. 13278 in the Mukim of Ampangan, District of Seremban, Negeri Sembilan Darul Khusus ('the said land') for a consideration of RM600,000.

[4] A sum equivalent to ten percent (10%) of the purchase price amounting to RM60,000 as a deposit and part payment was paid upon execution of the agreement. The balance of the purchase price payable in the sum of RM540,000 shall be payable in accordance with the terms and conditions of the agreement. Clause 3 of the agreement reads as follows:

> **3. Payment Of Purchase Price**
>
> 3.1 The Purchase Price shall be paid by the Purchaser in the following manner:
>
> (a) as to the Ringgit Malaysia Sixty Thousand (RM60,000.00) only (hereinafter referred to as "the Deposit") to be paid to the Vendor's Solicitors as stakeholders upon execution of this Agreement as a deposit and part payment of the Purchase Price.

(b) as to the balance of the Purchase Price of Ringgit Malaysia Five Hundred Forty Thousand (RM540,000.00) only (hereinafter referred to as "the Balance Purchase Price") *shall be paid to the Vendor* through the Vendor's Solicitors as stakeholders *on or before the date of expiry of three (3) months from the date of the execution of this Agreement or One (1) month from the receipt of the Letter of Consent to Transfer from the Land Office whichever is the latter* (hereinafter referred to as "the Completion Date") PROVIDED THAT the Purchaser's Solicitors has completed the registration of transfer in the title document. In the event the Purchaser's Solicitors fails to register the transfer for whatever reason as specified in Clause 15.1, the full sum of the Purchase Price shall be refunded. The Vendor's Solicitors shall release the Balance Purchase Price to the Vendor within fourteen (14) days after the presentation of the transfer and all relevant documents for registration at the appropriate land office in favour of the Purchaser.

3.2 The Vendor hereby irrevocably confirms and acknowledges that all payments made to the Vendor's Solicitors by the Purchaser shall be deemed to be payments made to and received by the Vendor towards the account of the Purchase Price and an acknowledgment from the Vendor's Solicitors acknowledging the receipt of such moneys shall be valid, good and effective discharge of the Purchaser for the same PROVIDED THAT all of which moneys shall be paid by the Completion Date or the Extended Completion Date. (emphasis added).

[5] There is also a specific provision in the agreement to deposit the original document of title, current quit rent receipts, assessment receipts and this is at cl. 5.3 which reads as follows:

5. Deposit Of Documents And Adjudication Of Transfer

5.1 ...

5.2 ...

5.3 Upon the execution of this Agreement, the Vendor shall deposit the original document of title, current quit rent receipts, assessment receipts (hereinafter referred to as "the Documents") with the Vendor's Solicitors for custody. *The Vendor's Solicitors is irrevocably authorised to forward the Documents to the Purchaser's Solicitors for registration after the Purchaser paying the Balance Purchase Price.* (emphasis added).

[6] Pursuant to cl. 5.3 of the agreement, it is clear that the 2nd appellant shall only forward the original document of title, current quit rent receipts and assessment receipts after the balance purchase price of RM540,000 had been received by the 2nd appellant as the vendor's solicitors.

[7] Notwithstanding the clear demarcation of rights and obligation of the parties involved as stipulated under cl. 5.3 of the agreement, the 2nd respondent wrote a letter dated 5 February 1998 to the 2nd appellant requesting for the original issue title together with the Original Letter of Consent of Transfer for presentation purposes on their undertaking to release to the 2nd appellant the balance purchase price within three weeks from the date of presentation.

Letter Dated 5 February 1998

[8] This case revolves around the letter dated 5 February 1998 (Undertaking Letter of 5 February) and it is a crucial piece of evidence and it is therefore felt proper to reproduce it in full hereunder.

Abu Talib Shahrom & Zahari
Peguambela & Peguamcara

Our Ref: ATSZ/COR/5365/97/HH
Your Ref: SMS/SEA/RB/8/42/97
5 February 1998

Messrs Saprudin & Co.
No. 62 First Floor
Jalan Tunku Antah
70100 Seremban
Negeri Sembilan Darul Khusus

Urgent/By Fax And Post
Fax No: 06-7620873

Attn: Encik Saprudin

Dear Sirs

Sale And Purchase Of Property Held Under H.S.(D) 72032 P.T. NO. 13278 Mukim Of Ampangan Vendor: Dandarawi Sdn Bhd

We refer to the teleconversation between Encik Saprudin and our Puan Hairolnisah of even date.

Kindly forward to us the original issue of title No. H.S. (D) 72032 P.T. NO. 13278 MUKIM OF AMPANGAN together with the original Letter of Consent to Transfer for presentation purposes at the relevant Land Office. With regards to the foregoing, we

undertake on behalf of our Client to release to you the balance purchase price of the above property within three (3) weeks from the date of presentation on the Transfer.

We further confirm that we have obtained the consent to charge of the property.

Yours faithfully,

Abu Talib Shahrom & Zahari

Sgd.

c.c. CD Anugerah Sdn Bhd (Fax No.: 7034279
Attn: Encik Mustafa Kamal Madin

[9] Paragraph 2 of the Undertaking Letter of 5 February is critical as it says:

Kindly forward to us the original issue of title No. H.S.(D) 72032 P.T. No.13278 MUKIM OF AMPANGAN together with the original Letter of Consent to Transfer for presentation purposes at the relevant Land Office. With regards to the foregoing, **we undertake** on behalf of our Client to release to you the balance purchase price of the above property within three (3) weeks from the date of presentation of the Transfer.

[10] This appears to be in variance with cl. 5.3 of the agreement. However since the 2nd respondent undertakes on behalf of their client to release to the 2nd appellant the balance purchase price of the said land within three weeks from the date of presentation of the transfer, the 2nd appellant obliged.

[11] The very next day, the 2nd appellant replied *vide* their letter of reference SMS/CT/rs/8/45/97 dated 6 February 1998 (6 February Letter) forwarding the Original Issue Document of title and the Original Consent Letter from Pejabat Setiausaha Kerajaan, Negeri Sembilan Darul Khusus. It was addressed to the 2nd respondent, Messrs Abu Talib Shahrom & Zahari. The content of the letter is plain and clear. Paragraph 2 of the 6 February Letter describes documents forwarded and para. 3 clearly states as follows:

Kindly take note that the aforesaid documents are forwarded to your goodselves for presentation purposes at the relevant Land Office and UPON your undertaking to release to us the balance purchase price of the above property within three (3) weeks from the date of presentation on the transfer and UPON your clients undertaking

to pay the interest for late payment calculated at 10% daily interest from the date of receipt of the consent to transfer on 11th December, 1997 till date of full settlement.

For ease of reference a copy of the 6 February Letter is reproduced hereunder.

Saprudin & Co.
Peguambela & Peguamcara

Your Reference: ATSZ/COR/5365/97/HH
Our Reference: SMS/CT/rs/8/45/97
Date: 6th February, 1998

M/s Abu Talib Shahrom & Zahari
Suite 29.02, 29th Floor, Menara Promet
Jalan Sultan Ismail
50250 Kuala Lumpur

Attn.: Puan Hairolnisah Hamdan

Dear Sirs,

Re: Sale & Purchase Of Property Held Under HS(D) 72032 PT 13278 Mukim Of Ampangan
Vendor: Dandarawi Sdn. Bhd.
Purchaser: CD Anugerah Sdn. Bhd.

We refer to your letter dated 5th February, 1997 with regard to the abovecaptioned matter.

We are pleased to forward herewith the Original Issue Document of Title for the abovecaptioned property and the Original Consent Letter from Pejabat Setiausaha Kerajaan, Negeri Sembilan Darul Khusus.

Kindly take note that the aforesaid documents are forwarded to your goodselves for presentation purposes at the relevant Land Office and UPON your undertaking to release to us the balance purchase price of the above property within three (3) weeks from the date of presentation on the transfer and UPON your clients undertaking to pay the interest for late payment calculated at 10% daily interest from the date of receipt of the consent to transfer on 11th December, 1997 till date of full settlement.

Kindy be informed that as at 6th February, 1998 the interest amount to RM8,580.82. Further additional interest is to be added until the date of full settlement.

Your attention to the above matter is highly appreciated. A

Meanwhile, kindly acknowledge receipt of this letter and the enclosures herein by signing and returning the duplicate copy hereof.

Thank you.

B

Yours faithfully,
Sgd.

[12] It will be noted here that the terms of the undertaking imposed by the 2nd appellant are not parlous but plain and clear. These are new terms imposed on the 2nd respondent and they supersede the terms of the Undertaking Letter of 5 February. C

[13] As can be seen hereunder the new undertakings imposed are unqualified and unequivocal. To paraphrase it, the documents were forwarded by the 2nd appellant to the 2nd respondent: D

(a) For the distinct purpose of presentation to the Land Office;

(b) Upon the undertaking of the 2nd respondent to release to the 2nd appellant the balance of purchase price of the said land within three (3) weeks from the date of presentation on the transfer; and E

(c) Upon the undertaking of the clients of the 2nd respondent to pay the interest for late payment calculated at 10% daily interest from the date of receipt of the consent to transfer on 11 December 1997 until the date of full settlement. F

[14] It must be highlighted here that there are three obligations to be fulfilled by the 2nd respondent as demanded by the 2nd appellant in their 6 February Letter. Firstly, the documents were to be forwarded for the purpose of presentation to the Land Office. G

[15] Secondly and more importantly the documents were sent **upon** the undertaking of the 2nd respondent to release the balance purchase price within three weeks from the date of presentation. It is pertinent to note that this term does not include the undertaking of the client but specifically that of the legal firm of the 2nd respondent. H

[16] Thirdly the documents were released **upon** the undertaking of the clients of the 2nd respondent to pay the late interest for late payment. I

[17] It must be emphasised here that the second requirement imposed is markedly distinct and in divergence with the letter from the 2nd respondent in that the undertaking is for the 2nd respondent, and not their client, to release the balance purchase price three weeks from the date of presentation of the transfer. This will be further discussed at the later part of this judgment.

[18] The 2nd respondent received and accepted the documents forwarded in the form of Original Issue Document of Title and the Original Letter of Consent without any qualification and caused the land to be registered in favour of CD Anugerah Sdn Bhd on 24 February 1998. By accepting and sending the necessary documents for registration in favour of their client, it would appear that the 2nd respondent has unequivocally accepted the terms imposed onto them by the 2nd appellant in the 6 February Letter.

[19] For the sake of completeness the said land was charged in favour of Mobil Oil Malaysia Sendirian Berhad as security for the loan of RM1.9 million granted to CD Anugerah Sdn Bhd. evidenced by a loan agreement dated 16 February 1998.

[20] On 6 March 1998 the 2nd respondent notified the 2nd appellant by way of an official letter that the memorandum of transfer in respect of the said land had been presented to the Land Office *vide* Presentation No. 3089/98 on 24 February 1998.

[21] The balance of the purchase price in respect of the said land was due and payable three weeks after the date of presentation ie, on 17 March 1998. No payment was received by then. Consequently on 18 March 1998 the 2nd appellant wrote to the 2nd respondent asking for the release of the sum of RM540,000.

[22] The 2nd respondent resiles from their undertaking by replying to the 2nd appellant on the same day in their letter in the following manner:

> We refer to your fax dated 18th March 1998 with regard to the above matter.
>
> We wish to confirm that until today, we have yet to receive the balance purchase price of RM540,000.00 from our client.
>
> With regard to the undertaking as contained in our letter dated 5th February 1998, we wish to highlight that such undertaking was given on behalf of our Client and not from our firm …

[23] When the dispute could not be resolved amicably the parties brought the matter before the learned High Court Judge at Seremban. After a full trial, it was the decision of the learned High Court Judge that the undertaking given by the 2nd respondent was not their personal undertaking. Rather, it was an undertaking given by them as an agent of their client. The claim of the 2nd appellant was therefore dismissed with costs, hence this appeal.

[24] Findings Of The Learned High Court Judge

(i) As mentioned earlier, the focus of the trial was on the abovementioned Undertaking Letter of 5 February.

(ii) The learned trial judge found that the facts showed the Undertaking Letter of 5 February prevailed over cls. 5.3 and 6.2 of the agreement.

(iii) Like cl. 5.3 of the agreement, cl. 6.2 also relates to the delivery of the documents upon receipt of full payment of the balance purchase price and it is quoted *in toto* hereunder:

> 6.2 The Vendor's Solicitors shall deliver or cause to be delivered to the Purchaser's Solicitors the Documents upon receipt of full payment of the Balance Purchase price.

(iv) The 2nd respondent gave the Undertaking Letter of 5 February on behalf of CD Anugerah Sdn. Bhd. and not in their personal capacity;

(v) The Undertaking Letter of 5 February was premised upon the payment of the balance purchase price by CD Anugerah Sdn. Bhd.

(vi) The 2nd respondent can only be responsible with regard to the Undertaking if the balance purchase price was received but not given to the 1st appellant.

[25] It was also the finding of the learned High Court Judge that the 2nd appellant knew or ought to have known that when the Undertaking Letter of 5 February was given, the balance purchase price of RM540,000 had not been received by the 2nd respondent.

A **[26] Shortcomings In The Judgment Of The Learned High Court Judge**

(a) When Were The Appellants Notified That The Balance Of Purchase Price Was Not With The 2nd Respondent?

B Contrary to the finding of the learned High Court Judge that the 2nd appellant knew or ought to have known that when the Undertaking Letter of 5 February was given, the balance purchase price of RM540,000 had not been received by the 2nd respondent, the facts of the case is totally different. The C appellants were only notified by the 2nd respondent in their letter dated 18 March 1998 under reference ATSZ/COR/5365/97/ HH SMS/CT/rs/8/45/97 in respect of the balance purchase price, at p. 266 appeal record. This is more than a month after the 2nd respondent had made an undertaking on behalf of their D client as contained in the Undertaking Letter of 5 February. Paragraph 2 of the letter reads:

> We wish to confirm that until todate, we have yet to receive the balance purchase price of RM540,000.00 from our E client.

This was in answer to a query made by the 2nd appellant as contained at para. 3 of their letter of 18 March 1998 wherein it was stated as follows:

F > We write to inform that pending further instructions from our client M/s Dandarawi Sdn Bhd we hereby request for a written confirmation from your goodselves as to whether the said sum of RM540,000.00 has been deposited with your goodselves.

G With respect, the decision of the learned High Court Judge was based on a wrong premise. Clearly there was a misdirection here.

Furthermore, by virtue of cls. 5.3 and 6.2 of the agreement it H is only reasonable for the 2nd appellant to expect that when the Undertaking Letter of 5 February was issued, there was in all probability the balance purchase price was with the 2nd respondent.

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(b) The Letter Dated 6 February 1998 From The 2nd Appellant Was Completely Ignored By The Learned High Court Judge In His Evaluation Of This Case

It has to be observed here that although the learned High Court Judge analysed the implications and consequences of the Undertaking Letter of 5 February, there is sadly an absolute lack of deliberation and appreciation on the efficacy of the 6 February letter. This letter is equally important in that it qualifies the Undertaking Letter of 5 February. This is a crucial letter in that the 2nd appellant sent the documents to the 2nd respondent **upon** the **undertaking** of the 2nd respondent to release to the appellant the balance purchase price of the said land **within** three (3) weeks from the date of presentation of the transfer. The fact that this was completely ignored clearly shows that the premise upon which the learned High Court Judge came to his conclusion and finding cannot be sustained.

(c) The Testimony Of The Writer (SD1) Of The Undertaking Letter Of 5 February

Nowhere in the judgment of the learned High Court Judge could one find any shred of analysis of the testimony and understanding of the writer of the Undertaking Letter of 5 February in respect of the 6 February letter sent by the 2nd appellant. The writer of the Undertaking Letter of 5 February was SD1, Puan Hairolnisah Hamdan. SD1 was also the Solicitor who received the Original Issue Document of Title and Letter of Consent which were enclosed in the 6 February Letter. Such testimony, in our view, is not only useful but pivotal for a proper interpretation and evaluation of both the Undertaking Letter of 5 February and the 6 February letter.

Testimony Of Puan Hairolnisha Hamdan

[27] It is appropriate here to advert to the evidence adduced by SD1, Puan Hairolnisha Hamdan on behalf of the 2nd respondent. SD1 signed the Undertaking Letter of 5 February and received both the Original Issue Document of Title and the Letter of Consent which were enclosed in the 6 February letter addressed to the respondent.

A Q: (Referring to the Undertaking Letter of 5 February)

Do you agree with me that we in "we undertake" refers to the 2nd Defendant

A: Yes.

B Q: (Referring to letter dated 6th February Letter @ page 250-251 of Appeal Record)

Do you agree with me that the 2nd Plaintiff states that he sends the Original Title and Original Letter of Consent upon
C your undertaking … and your client's undertaking …?

A: Yes.

Q: Do you agree with me that there are 2 undertakings, one by the 2nd Defendant, the other the 1st Defendant's undertaking?

D A: Yes.

Q: Did you after reading this letter (pages 250-251 of Appeal Record) disagree with the terms therein and return the Original title and Original Letter of Consent to 2nd Plaintiff,
E saying that the 2nd Defendant does not agree to Undertake?

A: No. (emphasis added)

[28] From the above excerpt it is patently clear therefore that SD1 agreed with the proposition posed during Cross Examination that
F she did not disagree with the terms of 6 February Letter. Further SD1 also confirmed that neither did she return the Original Title and Original Letter of Consent to the 2nd plaintiff nor did she say that the 2nd defendant does not agree not to undertake as required by the appellant.

G **[29]** Put simply, SD1 agreed with the terms imposed by the 6 February Letter and in the event that those terms were not agreed to, the Original Issue Document of Title together with the Original Letter of Consent would have been returned to the 2nd
H appellant.

[30] It will be observed that para. 3 of the 6 February Letter contains two undertakings as admitted by SD1 and these are:

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(1) The Undertaking of the 2nd respondent to release to the 2nd appellant the balance purchase price of the said land within three (3) weeks from the date of presentation of the transfer; and

(2) The Undertaking of the client of the 2nd respondent to pay the interest for late payment.

[31] These terms are couched in lucid, clear, unqualified and unequivocal language. The 2nd respondent received and accepted the Original Documents of Title and the Original Consent Letter without any qualification and caused the said land to be transferred and registered in favour of CD Anugerah Sdn Bhd on 24 February 1998. In so doing the 2nd respondent had agreed to accept and comply with the terms of the 6 February Letter.

[32] From the above appraisal, the following can be deduced:

(i) The 6 February Letter supersedes the Undertaking Letter of 5 February;

(ii) SD1 accepted the terms and conditions imposed by the 2nd appellant as contained in the 6 February Letter.

(iii) If the terms of the 6 February Letter were unacceptable to the 2nd respondent then the Original Issue Document of Title in respect of the said land together with the Original Consent Letter from Pejabat Setiausaha Kerajaan, Negeri Sembilan Darul Khusus would have been returned to the 2nd appellant.

(iv) The 2nd appellant only knew that the balance purchase price of the said land was not with the 2nd respondent on 18 March 1998.

The Law

The Construction Of The Undertaking Letter Of 5 February And The 6 February Letter

[33] The 2nd respondent received and accepted the 6 February Letter without any qualification and acted on it by causing the said land to be registered in favour of CD Anugerah Sdn Bhd and subsequently charged the same to Mobil Oil Malaysian Sendirian Berhad.

[34] The subsequent letters written by the 2nd respondent after the registration of the transfer and charge are an afterthought. On the issue of construction and conduct of parties subsequent to the execution of contract see, *James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796 where the House of Lords said:

> In construing a contract (eg for purposes of ascertaining any intention of the parties thereto as to the proper law) it was not proper to have regard to the conduct of the parties after the contract had been made.

[35] Lord Reid in his judgment said at p. 798:

> I must say that I had thought that it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

[36] With respect we agree with the sentiments expressed above and accept it as the correct principle of law. Hence the letters made after the 6 February Letter cannot be taken into account to ascertain the intention of the parties. Furthermore s. 73A(3) of the Malaysian Evidence Act 1950 (Act 56) says, "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish."

Letter Of Undertaking From Solicitors

[37] The importance of respecting an undertaking given by solicitors is being underlined by Suriyadi JCA in *Nasir Kenzin & Tan v. Elegant Group Sdn Bhd* [2009] 1 AMR 715 when his Lordship said at p. 729: "… the impugned undertaking is a promise or security given in the course of an arrangement for obtaining some concessions from the respondent, and binds the appellant in law. The seriousness of an undertaking cannot be underestimated especially one given by a member of the legal profession because a breach of the undertaking will whittle away public confidence and trust in the legal profession."

[38] The probity, decency and credibility of the solicitors who failed to honour their letter of undertaking will be at stake. Letters of undertaking are widely used in the legal practice particularly in firms which handled substantial conveyancing work. In practice letters of undertaking are used in a number of transactions ranging from the release of funds to customers by banking and financial institutions before documents of unencumbered document of titles are properly registered with the appropriate Land Registries. Another situation where a letter of undertaking is being used is where documents of titles are released before full payment of the purchase price had not been made as in this instant case. Solicitors making the undertaking should not renege on their undertaking as this is the very basis for their own honoured existence as conveyancing lawyers. This is a solemn and sacred duty of solicitors. Issuance of a letter of undertaking from one firm to another marks the epitome of conveyancing practice in any Torrens jurisdiction.

[39] It is incumbent upon all solicitors to examine each given undertaking closely. The fact that the undertaking is made on behalf of their client should not and will not absolve them from the need to be responsible for their actions in ensuring that all is in order before such letters of undertaking are issued or accepted or even acted upon. This is because each and every word used must be properly construed as in the English Court of Appeal's case of *Caldwell v. Sumpters (a firm) and Another* [1972] 1 All ER 567. The brief facts of the case was that Sumpters, the first defendant, were formerly the plaintiff's solicitors and were instructed by her to act, amongst other things, in connection with the proposed sale to the Brighton Corporation of her house at Brighton. For this purpose the plaintiff's title deeds to the house were deposited with Sumpters. There was no binding agreement to buy the house but the Brighton Corporation had indicated their willingness to buy it providing the plaintiff could give vacant possession. The difficulty was that the tenants occupying the house refused to move out prompting Sumpters, with the plaintiff's authority, instructed Bosley & Co, a firm of solicitors practising in Brighton, to take the necessary proceedings to evict the tenants.

[40] Sumpters, on the plaintiff's instructions, gave Bosley & Co their undertaking that the costs incurred in connection with these proceedings would be paid. Sumpters, also by a letter written on the plaintiff's instruction, gave their undertaking to her bank that on the completion of the sale of the house they would discharge the plaintiff's indebtedness to her bank out of the proceeds of the sale.

[41] Then in the summer of 1969, the plaintiff changed her solicitors, transferring her legal business to Margolis & Co. At that time, according to Sumpters, the plaintiff owed them some 322 Sterling Pounds for costs. In October 1969 Margolis & Co had for some time been pressing Sumpters for the title deeds of the house. These were required to prepare a contract of sale to the Brighton Corporation and would be required subsequently to hand over to the corporation on completion. Sumpters, however claimed the solicitor's lien over these documents in respect of their costs and their personal liability on the undertakings referred to earlier. Neither the lien nor its amount was disputed. Sumpters expressed their willingness to hand over the title deeds to Margolis & Co providing that Margolis & Co would undertake to honour the undertakings which Sumpters had given on the plaintiff's instructions to Bosley & Co and the bank and also undertake to pay the costs due by the plaintiff to Sumpters. Margolis & Co asked Sumpters for details of these undertakings. This was not forthcoming and the undertakings were never given.

[42] On 15 January 1970 Sumpters sent the deeds to Margolis & Co under cover of a letter, the material part of which reads as follows:

> These deeds and documents are being sent to you on the understanding that you will hold them to our order, pending the payment of our fees and your Undertaking to honour those Undertakings which we have given on behalf of Mrs Caldwell (the plaintiff), on her instructions, and the payment of fees, etc., of other professional firms who have acted on Mrs. Caldwell's instructions and have not yet been paid by her.

[43] Salmon LJ said at p. 570 g-i:

> The crucial factor in this case is that Sumpters, because of their lien, had the legal right to possession of the documents. The documents were being offered on the terms of the letter of 15th January. *The law does not in my view allow retention of the documents and repudiation of the terms on which they are offered. This seems to me to be clear on principle.* There is little authority on the point, possibly because it is so plain. What authority there is tends to support the view I have formed. There is certainly no authority the other way. (emphasis added)

[44] Similarly in this instant case, the Original Document of Title and the Original Consent Letter were offered to the respondent on the terms of the 6 February Letter. In the event that the respondent was unable to perform the obligations required they should have returned the Document of Title and the Original Consent Letter to the 2nd appellant. The respondent failed to return the documents and proceeded with the registration of the transfer and in the upshot they must be held to have accepted the terms of the 6 February Letter and must be held responsible for the undertaking.

[45] In the High Court of Australia's case of *Hawkins v. Gaden* [1925] 37 CLR 183, Starke J summed up at p. 207 as follows:

> The legal effect of the undertaking remains for consideration. When a party undertakes, without any qualification, to satisfy requisitions or to obtain an authority to receive money, that must mean that he is the person to whom the other party is to look for performance of the promise. The defendants are, therefore personally liable upon the undertaking.

[46] He adds further that "The defendants or their clerk may not have appreciated the effect of the undertaking, and that is, no doubt, unfortunate. The construction, however, of the undertaking does not depend upon the understanding of the defendants, but upon the legal effect of the words which they have used in that document."

[47] This prompted Lord Diplock to say in the Privy Council case of *T Damodaran v. Choe Kuan Him* [1979] 1 LNS 107; [1979] 2 MLJ 267 at p. 269 that: "The main purpose and value of a solicitor's undertaking in transactions for the sale of land is that it is enforceable against the solicitor independently of any claims against one another by the parties to the contract of sale."

[48] For the purpose of completeness, it is desirable to look at the authority cited by the learned High Court Judge at p. 25 of the Appeal Record ie, *Syarikat Jengka Sdn Bhd v. Tri Trade Properties (M) Sdn Bhd & Ors* [1988] 2 CLJ 852; [1988] 2 CLJ (Rep) 451. The facts are simple. The plaintiff's claim against the defendant is for the sum of RM346,500 being balance owned to the plaintiff in respect of goods sold and delivered to the 1st defendant. The 2nd defendant is alleged to have by a letter of undertaking undertook to

pay the plaintiff all outstanding sums in the 1st defendant's account with the plaintiff up to a maximum of RM500,000 and upon the expiry of sixty days after the date of delivery of the said goods. The 2nd defendant denied that he was liable to pay the plaintiff the amounts claimed.

[49] Held No. 2: Clearly there are issues to be tried in this case.

[50] This case relates to an application for summary judgment and is therefore distinguishable on facts.

[51] The learned judge ordered that the application of the plaintiff dated 24 April 1985 for an order that both the statements of defence of the partners of the second defendant (sued as a firm) be struck off and judgment be entered against the second defendant be disallowed on the grounds that there are triable issues of fact.

[52] This case cannot be used as the authority for an undertaking letter as can be seen in the judgment of the learned Zakaria Yatim, J (as he then was) where he said at p. 451h:

> This is an appeal against the decision of the Senior Assistant Registrar, Mr. Wong Teik Meng given on 15th August, 1985 ordering that the application of the plaintiff dated 24th April 1985 *for an order that both the statements of defence of the partners of the second defendant (sued as a firm) be struck off and judgment be entered against the second defendant be disallowed on the grounds that there are triable issued (sic) of fact in this matter.* (emphasis added).

[53] At p. 454c the learned judge concluded:

> Clearly there are issues to be tried in this case and I agree with the decision of the Senior Assistant Registrar. I therefore dismiss the appeal with costs in any event.

[54] From what has been discussed earlier, it was the unanimous decision of this court that if the 2nd respondent was unable to adhere and comply with the requirements of the 6 February Letter, the 2nd respondent should have returned the documents to the 2nd appellant rather than proceed to register the transfer. On the balance of probabilities the 2nd respondent's failure to return the Original Document of title and the Original Consent letter to the 2nd appellant means that the 2nd respondent accepted the terms imposed by the 2nd appellant as contained in the 6 February Letter and therefore liable and is hereby held liable.

[55] The appeal is hereby allowed with costs. After hearing the submission of both counsel costs was fixed at RM20,000 to be paid by the respondent to the appellants. The decision of the learned High Court Judge is hereby set aside.